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In The
SUPREME COURT OF THE UNITED STATES

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS, Petitioners,
v.
UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether deep plowing ranchland to plant deep-rooted crops constitutes the "addition" of a "pollutant" (the plowed soil) from a "point source" (the plow) so as to fall within the regulation of Section 404 of the Clean Water Act.

2. Whether deep plowing ranchland which is farmable in its natural state to plant deep-rooted crops is statutorily exempt from regulation under Section 404(f)'s exemption for any discharge from "normal farming * * * activities such as plowing."

3. Whether the Clean Water Act's civil penalty section, authorizing penalties "not to exceed $25,000 per day for each violation," authorizes assessing the maximum daily penalty for each time a plow crosses a seasonal drainage feature, without regard to the number of days when such activity occurred.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's opinion on summary judgment (Pet. App. 28-56) is unreported. Its decision after the counterclaim trial (Pet. App. 67-121) is unofficially reported at 1999 WL 1797329.

JURISDICTION

The court of appeals' judgment was entered August 15, 2001. On November 28, 2001, the court of appeals denied petitioners' petition for rehearing *en banc*. Pet. App. 208. The petition for writ of certiorari was filed on February 25, 2002, and granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Clean Water Act, 33 U.S.C. Sections 1311 et seq., together with pertinent parts of the relevant regulations, 40 C.F.R. Section 232, and 33 C.F.R. Section 323, are reproduced at Pet. App. 209-218. The Corps' and EPA's December 1996 Field Memorandum regarding deep plowing is set forth at Pet. App. 199.

STATEMENT

The fundamental issue in this case is whether a farmer and rancher may deeply *plow* his agriculturally-zoned, semi-arid ranchland to plant higher value crops without need of a federal permit or, conversely, whether the U.S. Army Corps of Engineers ("Corps") has jurisdiction to regulate such ac-

tivity under the Clean Water Act ("CWA" or "Act").[1] The Corps asserts that the traditional farming activity of *plowing alone* of dry ground in areas of seasonal wetlands constitutes the "addition" of "pollutants" (native soil) from a "point source" (the plow) which is regulated under the "dredge and fill" permit program it administers under CWA Section 404.

The Ninth Circuit majority (Gould, J., dissenting) upheld the Corps' expansive claim of jurisdiction over traditionally local activities. It held that deep plowing – which does not "add" or convey materials from any "point source," and merely results in native soil being turned within the same general location – produces a "regulable redeposit" of the plowed soil "pollutant" because it "constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8. The majority relied on the Ninth Circuit's prior decision holding redeposits of processed materials extracted from in stream placer mining operations are regulated, and a Fourth Circuit decision holding "sidecasting" from backhoe dredging to drain wetlands for residential subdivision construction is regulated. *Rybachek v. United States,* 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. Deaton*, 209 F.3d 331, 333-336 (4th Cir. 2000). Pet. App. 6-8. Dissenting Judge Gould would have followed the D.C. Circuit Court of Appeals' contrary decision in *National Mining Ass'n v. U.S. Army Corps of Eng'rs.*, 145 F.3d 1399, 1404 (D.C. Cir. 1998), and held "the return of soil in place after deep plowing is not a 'discharge of a pollutant.'" Pet. App. 18.

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[1] While this Court's recent decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs. ("SWANCC")*, 531 U.S. 159 (2001), addressed the scope of *geographic* jurisdiction under the CWA, this case addresses the distinct issue of *activities* jurisdiction. See Benjamin H. Grumbles, *Section 404(f) of the Clean Water Act: Trench Warfare Over Maintenance of Agricultural Drainage Ditches*, 17 Wm. Mitchell L. Rev. 1021, 1025 (1991) (distinguishing concepts of "activities" and "geographic" jurisdiction).

Despite the CWA's express statutory exemption for any "discharges" from "normal farming * * * and ranching activities such as plowing," Pet. App. 210, the Ninth Circuit majority also held Section 404(f) "recaptures even normal plowing" that prepares land for a new crop because "[c]onverting ranch land to orchards and vineyards * * * [brings] land 'into a use to which it was not previously subject.'" *Id.* at 10, 211.

The Ninth Circuit's decision conflicts with the CWA's plain language, statutory scheme and legislative history, the Corps' *authorized* regulations and guidance, and principles of federalism. Section 404 applies only to "discharges" of "pollutants," defined as "addition" of pollutants to navigable waters from a "point source." 33 U.S.C. §§ 1362(16), (12). The activity of plowing alone does not "add" pollutants and does not produce regulated point source "discharges." To the contrary, the relevant statutes, regulations and regulatory guidance expressly exclude *all forms of plowing* from Section 404 regulation, an exclusion clarified and confirmed by Section 404(f)(1)'s "farming exemptions" and by abundant legislative history evincing Congress never intended to regulate plowing. No other case has invoked the facially-narrow "recapture provision" to hold that any form of plowing *alone* – as opposed to plowing conducted incidental to and as a minor part of *other activities* primarily intended to fill and dry out waters or wetlands – is a CWA-regulated activity.

Congress did not intend to federalize regulation of traditionally local land use matters and agricultural activities when it adopted the CWA. It did not envision when it enacted the CWA and its "farmer exemptions" that a farmer or rancher desiring to plow his field to plant higher value crops – a normal activity engaged in since colonial times, Pet. App. 18 – would require a federal permit for the "discharge" of "pollutants" from a "point source" to do so.

A. The Statutory and Regulatory Scheme.

1. The Elements of Section 404 Jurisdiction.

CWA Section 404 authorizes the Corps to regulate "the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); Pet. App. 210. Section 301(a) provides that any such discharge requires a permit. § 1311(a); Pet. App. 209. "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." § 1362(16), (12); Pet. App. 212. As a prerequisite to the existence of a regulated point source "discharge," the statute's plain text requires an "addition" of a "pollutant." To "add" is "to join or unite (to) so as to increase the number, size, quantity, etc." Webster's Dictionary Of The English Language Unabridged (Encycl. ed. 1977), p. 21.

The Corps' regulations provide in pertinent part:

> The term *discharge of fill material* means the addition of fill material into waters of the United States. * * * *The term does not include plowing*, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. § 323.2(f), emph. added. The EPA's and Corps' regulations defining "plowing" likewise expressly *exclude* it from Section 404 regulation as a "non-discharge":

> *Plowing means all forms of primary tillage*, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means *utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops.* * * * *Plowing* as described above *will never involve a discharge* of dredged or fill material.

33 C.F.R. § 323.4(a)(1)(iii)(D) (Corps regulation), emph. added; Pet. App. 216; see *id.* at 218, citing 40 C.F.R. § 232.3(d)(4) (parallel EPA regulation).

While the Corps' initial regulations implementing the 1972 CWA did not address plowing,[2] interim final regulations published in 1975 (40 Fed. Reg. 31320) and final regulations published July 19, 1977 (42 Fed. Reg. 37122) expressly addressed and exempted materials produced or resulting from "normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting" from the definitions of "dredged" or "fill material." 40 Fed. Reg. at 31321, 31325; 42 Fed. Reg. at 37124, 37130, 37145.

The Corps' 1975 and 1977 regulations excluding plowing and other normal farming activities from the Section 404 program were in place prior to the 1977 CWA amendments adding a statutory exemption for these activities. See 45 Fed. Reg. 62732 (1980). As stated by Assistant Secretary of the Army Victor Veysey in 1975 testimony to a House subcommittee: "We must dispel fallacies that the Corps is proposing to regulate a farmer plowing his field." See *Corps Issues Interim Rules For Discharges of Dredged and Fill Materials*, 5 Envtl. L. Rep. 10143 (1975).

As explained in the preamble to the Corps' 1977 regulations:

> The [1975] regulations * * * identified certain types of activities that were excluded from the program because they do not involve the discharge of dredged or fill material into water. Plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products were included in this list of excluded activities.

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[2] See 38 Fed. Reg. 12217 (1973); 39 Fed. Reg. 12115 (1974).

42 Fed. Reg. at 37124 (1977). As further explained by the Corps:

> We intended * * * to make it clear that activities such as plowing, seeding, harvesting, cultivating and any other activity by any industry that do not involve discharges of dredged or fill material cannot be included in the program. * * * We have * * * clarified our intent by stating at the end of our definitions of "discharge of dredged material" and "discharge of fill material" that plowing, seeding, cultivating and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program.

42 Fed. Reg. at 37130 (1977); see *id.* at 37145 (definitions of discharge of dredged and fill material at 33 C.F.R. § 323.2(l), (n) excluding plowing, etc.).

As confirmed in the Corps' February 1986 Regulatory Guidance Letter, No. 86-01 ("RGL 86-01") on the subject:

> *Plowing* for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 *will never involve a discharge* of dredged or fill material. *Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations.* Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit. (Emph. added.)[3]

While plowing is not dredging,[4] agencies and courts have also addressed the meaning of "addition" in the context of

[3] RGL 86-01 has been lodged with the Clerk of the Court.

[4] Although the district court denied that *dredging* concepts and regulations, including the reasoning of the *National Mining* case, have any relevance to plowing activities, Pet. App. 38, fn. 7, the Ninth Circuit majority relied wholly on dredging cases in affirming the judgment against petitioners. Pet. App. 6-7. Whether "dredged" or "fill" material is involved, the "addition" requirement for CWA Section 404 jurisdiction is the same.

deciding whether incidental soil movement occurring during *dredging* operations is regulated under Section 404. In the preamble to its 1986 regulations, the Corps stated (51 Fed. Reg. 41206, 41210 (1986)):

> Section 404 clearly directs the Corps to regulate the discharge of dredged material, not the dredging itself. Dredging operations cannot be performed without some fallback. However, if we were to define this fallback as a 'discharge of dredged material,' we would, in effect, be adding the regulation of dredging to Section 404 which we do not believe was the intent of Congress. We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under Section 404. The purpose of dredging is to remove material from the water, not to discharge material into the water.

The EPA and Corps reversed this previously longstanding position that "incidental fallback" is not a regulated "addition" by adopting regulations in 1993 redefining "discharge of dredged material" at 33 C.F.R. § 323.2(d) and 40 C.F.R. § 232.2(e), as part of the settlement of *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992). See 58 Fed. Reg. 45008. The so-called "*Tulloch* Rule" purported to extend the Corps' jurisdiction to "[a]ny addition, including any redeposit, of dredged material, * * * into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45037.[5]

[5] At the same time the EPA and Corps continued to acknowledge several pertinent points. First, "EPA and the Corps agree * * * that the presence of a 'discharge' into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under Section

In 1998, the D.C. Circuit struck down the *Tulloch* Rule, holding that "incidental fallback" of native material from a dredge bucket during aquatic dredging operations is not an "addition" of pollutants and thus not a "discharge" regulated under Section 404, because no materials are added and the disturbed native materials fall back to their same general location. *National Mining,* 145 F.3d at 1404.

In the case at bar, the courts below treated (1) plowing as involving a "discharge" (and, hence, "addition"), (2) plowed native soil as both a "pollutant" and "fill material," and (3) plows themselves as regulated "point sources." "Pollutants" within the Act include, *inter alia*, "dredged spoil, * * * biological materials * * * rock, sand, cellar dirt * * * and agricultural waste discharged into water." § 1362(6); Pet. App. 211. "Fill material" is material used for the "primary purpose" of replacing an aquatic area with dry land or changing the bottom elevation of a water body. *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs.,* 151 F.3d 1162, 1168 (9th Cir. 1998); *National Mining,* 145 F.3d at 1402, fn. 1. A "point source" is "any discernible, *confined and discrete conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." § 1362(14); Pet. App. 212, emph. added.

The "navigable waters" over which the Corps asserts jurisdiction on the semi-arid Borden Ranch are widely dispersed seasonal drainage swales and intermittent drainages. These are shallow linear features ranging from several inches to several feet wide, and up to several hundred feet long,

404." 58 Fed. Reg. at 45011. Second, it is "flatly incorrect that this rule would trigger Section 404 jurisdiction over a discharge based upon the environmental effect of the associated activity." *Ibid.* Third, "We agree * * * that Section 404(f)(2) does not expand the scope of activities subject to Section 404." *Id.* at 45012.

which carry stormwater runoff for brief periods only during and after seasonal rains, and which ultimately drain to intermittent streams, which themselves ultimately flow to tributaries of navigable waters. Pet. App. 2; ER1011-12.[6] The Corps defines wetlands as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b).

2. The CWA's Farming Exclusions and Exemptions.

Even though the Corps' regulations already specifically excluded normal farming activities from the Section 404 program as not involving a "discharge," in 1977, Congress amended Section 404 to expressly codify and expand the "farming exemptions" to exempt any "discharge"

> *from normal farming*, silviculture, *and ranching activities such as plowing*, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices. (Emph. added.)

33 U.S.C. § 1344(f)(1)(A); Pet. App. 210.

Section 1344(f)(2)'s textually narrow "recapture" exception – which, as recognized by the Corps' and EPA's regulations specifically defining "plowing" and the Corps' RGL 86-01, does not apply to plowing because plowing involves no "discharge" – requires a permit for:

[6] As cited herein, "ER" is the "Excepts of Record" from the Ninth Circuit's proceedings, "CR" is the Court Record, taken from the district court's Docketing Sheet, and "TE" is a district court Trial Exhibit.

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, *where* the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

§ 1344(f)(2); Pet. App. 211, emph. added.[7]

In conflict with two decades of its own regulations and guidance, the Corps on December 12, 1996, for the first time issued public guidance distinguishing "deep ripping" from other forms of plowing. Corps/EPA Memorandum to the Field., Pet. App. 4, 199-207. The 1996 Field Memorandum was never adopted as a regulation through formal notice and comment rulemaking procedures; it came nearly 20 years after the 1977 "farming exemption" amendments to the CWA, and only *after* Tsakopoulos' dedication of a 1418-acre preserve and *after* all Borden Ranch plowing operations at issue in this case had already occurred. Pet. App. 103; CR189, ER1043:12-15; TE78, 80, 83, 85, 88; ER90, 97, 133, 148, 158, see CR204, ER909.

The 1996 Field Memorandum asserts that "Deep ripping to establish a farming operation at a site where a ranching * * * operation was in place is a change in use of such site." Pet. App. 206. On this basis, for the first time ever, the Corps asserted that a form of *plowing alone* is subject to Section 404 regulation *and* that a mere change in crop – from forage to grapes or apples – is a "change in use" coming within the recapture provision. The Memorandum also appears to argue that "deep ripping," while it is concededly done to "break up" soil "to prepare a site for establishing crops," Pet. App.

[7] The statute thus requires *two* separate elements for "recapture" of discharges from an otherwise exempt activity: (1) a new use to which the waters were not previously subject, *and* (2) consequent and intended impairment of flow or reduction in reach of navigable waters.

204, 202, is nonetheless "distinguishable from plowing" based on *where* it occurs (sometimes in seasonal wetland areas), its *depth*, and its *effects* on site hydrology. Pet. App. 204-205. The Memo goes so far as to state that the hydrological effect of deep plowing – and presumably *any* exempt plowing – *alone* is sufficient to trigger the "recapture" provision, regardless of whether the area is brought into a use to which it was not previously subject. See Pet. App. 206 ("altering or removing the wetland hydrology of the site" alone triggers recapture).

3. The Penalty Provision.

33 U.S.C. Section 1319(d), Pet. App. 209, authorizes civil penalties "not to exceed $25,000 **per day** for **each violation**" for discharging pollutants without a permit. Similar "per day of violation" language appears in the Act's *criminal* penalty provisions as well. 33 U.S.C. §1319(c).

B. Petitioners' Plowing Activities On Borden Ranch and the Corps' Assertion of Jurisdiction.

The 8,400-acre Borden Ranch is agriculturally-zoned, Central Valley land, located in Sacramento and San Joaquin Counties, that is bisected by Dry Creek, the County Line. Presently owned by Borden Ranch Partnership ("BRP") (Tsakopoulos is managing partner and title holder) and its vendees, the Ranch has historically been used for cattle grazing, irrigated pasture, and growing wheat, hay, alfalfa, and row crops. Since late 1993, portions have been deep plowed and planted to vineyards and orchards. The Ranch contains seasonal hydrological features such as swales and intermittent drainages (both hereinafter "drainages"). ER1011-12; Pet. App. 2-3. The Corps asserted jurisdiction over these drainages as "navigable waters" and contended that deep plowing rangeland in delineated "waters" discharges dredged or fill material and requires a Section 404 permit. CR189, ER1013-1015; Pet. App. 3.

Despite the Act, their own regulations, and RGL 86-01, which entirely exclude (as "non-discharges") *all* forms of plowing from Section 404 regulation, the Corps and EPA purported to distinguish deep plowing from shallower plowing for purposes of regulation. The Corps contended plowing in seasonal wetlands to "root zone depth" is not regulated but that deep plowing in the same areas is.[8] The Corps and EPA contended that deep plowing would adversely affect "navigable waters" by puncturing restrictive subsurface soil layers believed integral to their inundation and functioning. TE30, ER13-15, 20-21, TE31, Pet. App. 2-3. Relying on the Corps' contradictory oral and written advice differentiating among different forms of plowing based on depth, Tsakopoulos tried to plow in ways the Corps told him would not require permits. CR204, ER921:8-16.

In response to Tsakopoulos' questioning of the basis of its authority to regulate his farming activities, the Corps – itself in doubt – sought guidance from EPA in 1994 as to whether the CWA's "farming exemptions" applied to Tsakopoulos' deep plowing. TE21, ER7. Unsurprisingly, EPA endorsed the Corps' asserted jurisdiction, and the Corps in late 1994 again attempted to distinguish deep plowing from shallow plowing at root zone depth, which it conceded was authorized in areas of the Corps' geographic jurisdiction under the exemptions without a permit, and which one Corps regulator testified was 18 to 24 inches into the soil. TE30, ER13, CR204, ER910:18 – 911:2. Tsakopoulos authorized further plowing under the Corps' guidance until the winter rainy season, when it is not possible to plow any areas (whether "upland" or "wetland") once the ground becomes wet. CR204, ER909:3-6, CR226, ER981-983.

[8] TE30, ER13. The phrase "root zone depth" does not appear in the Act or any Corps or EPA regulations, none of which purport to distinguish between exempt and non-exempt forms of plowing by depth.

In 1995, Corps and Federal Natural Resources Conservation Service ("NRCS") officials met at the Ranch to discuss Tsakopoulos' plowing plans for that year. NRCS advised that "deep-ripping" through drainages *had no adverse hydrological impact and was a good farm management practice.* CR204, ER915:11-20. The Corps nevertheless continued to assert jurisdiction over deep plowing, but told Tsakopoulos he could deep plow uplands and also cross "waters/wetlands" provided that when he did so he raised the plow shank. TE31, ER20, TE558, ER16; see Pet. App. 3. Tsakopoulos attempted to comply. CR204, ER921:8-16. The Corps and EPA later claimed noncompliance, however, and issued a November 1995 cease and desist order. Pet. App. 3; TE50, ER30. Without conceding wrongdoing, Tsakopoulos settled the alleged 1994 and 1995 plowing violations in May of 1996, by dedicating a 1418-acre seasonal wetlands preserve in the heart of Borden Ranch. Pet. App. 3-4, 165, 176; TE66, ER33, TE592, ER65.

In September 1996, Corps and EPA officials provided guidance for 1996 plowing on the Ranch and reconfirmed that without a permit Tsakopoulos could deep plow uplands and cross the narrow, dry and widely-dispersed drainages with the plow shank raised. CR204, ER922-926. Tsakopoulos again attempted to comply. TE617, ER96, TE615, ER88, CR227, ER994-995, CR226, ER984-987.

Following completion of all plowing activities at issue in this action (see TE78, 80, 83, 85, 88, ER90, 97, 133, 148, 158), the Corps issued the December 12, 1996 Field Memorandum, purporting to distinguish – for the first time ever in any publicly available guidance – "deep ripping" from other forms of plowing for purposes of regulation under Section 404. In light of the past difficulties, Borden Ranch applied in late January 1997 for a CWA Section 404 permit for its re-

maining portions of Borden Ranch. Pet. App. 41, fn. 11, 81.[9] After the 1996-1997 rainy season, the Ranch also resumed shallow plowing (disking). Almost immediately, EPA representatives unaware of the September 1996 guidance descended on the site and saw shallow furrows through some drainages (from raised deep plow shanks). CR226, ER970:17-973:23; Pet. App. 4. Ignoring written and oral concerns expressed by EPA's Washington headquarters that deep plowing *might not produce jurisdictional discharges* in light of the district court's then-recent *National Mining* decision, TE630, ER309, EPA Region 9 issued an April 1997 cease and desist order stopping all Borden Ranch activity involving machinery crossing drainages, TE103, ER313; Pet. App. 4, resulting in enormous economic damages to Borden Ranch.

C. Petitioners' Challenge To The Corps' Jurisdiction Over Plowing And The District Court's Ruling.

Petitioners filed suit challenging the Corps' and EPA's regulation of plowing activities on Borden Ranch. CR1, ER328. The Government counterclaimed alleging CWA violations by "filling waters of the United States." CR7, ER385; Pet. App. 4.[10] The district court denied Tsakopoulos' summary judgment motion, and partially granted the Government's motion, leaving for trial the Counterclaim alleging CWA violations. Pet. App. 28-56, CR74, ER500-526; Pet. App. 4-5.

[9] The Ranch had previously been issued "after-the-fact" permits by the Corps authorizing the plowing previously done. Pet. App. 72, 74, 77-78.

[10] The Government chose to stop processing Borden Ranch's pending CWA Section 404 permit application as a result of the litigation, Pet. App. 41, fn. 11, and refused to further process it as a possible means of resolving the dispute despite Borden Ranch's repeated requests that it do so.

Following a bench trial, the district court found 348 separate deep plowing violations in 29 widely dispersed drainages (aggregating "about 2 acres" in total area). Pet. App. 67-121. Despite Tsakopoulos' acknowledged efforts to follow the Corps' guidance, Pet. App. 143-144, the district court's finding that the violations "affected a relatively small area of jurisdictional waters" (Pet. App. 105), and its finding that the "acreage involved in these violations constitutes a miniscule fraction of the total land converted to vineyards" (Pet. App. 109), the court nevertheless imposed a **$1.5 million civil penalty**, although Tsakopoulos could, and did, elect to substitute a four-acre restoration project for $1 million of the penalty. Pet. App. 5, 118.[11]

D. The Ninth Circuit's Divided Decision.

The Ninth Circuit in relevant part affirmed the district court in a divided 2-1 decision. The majority reasoned that this case was like *Rybachek*, 904 F.2d 1276, which held placer mining, i.e., extracting raw materials from a stream, processing them to remove gold, and later returning the mining overburden to the stream at a distance from the original location, constituted "addition" of a "pollutant" and hence a "discharge." It also relied on *Deaton*, 209 F.3d 331, which held "sidecasting" materials from digging a 1240-foot drainage ditch to drain wetlands for residential subdivision construction produced a regulated "discharge." Pet. App. 6-8. The majority rejected petitioners' argument that deep plowing to prepare land for new crops is wholly unlike those dredging activities and even less like an "addition" of pollutants than the "incidental fallback" the D.C. Circuit in *National Mining* held unregulated under Section 404. It distin-

[11] Placing the matter in further perspective, under the Corps' regulations in effect at that time, as admitted by the Colonel in charge of the Corps' Sacramento office, up to *one acre* of wetlands could be *completely* filled and destroyed without obtaining a CWA Section 404 Permit. Aug. 24, 1999 Reporter's Transcript, 127:4-8 (first day trial testimony of Corps' Col. John N. Reese).

guished *National Mining* in a footnote, asserting deep plowing "does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit." Pet. App. 8, fn. 2.

Rejecting petitioners' argument that plows are not "point sources," the Ninth Circuit relied on a Fifth Circuit case holding "bulldozers and backhoes" can constitute "point sources" where they are performing *earthmoving, excavation* and *ditching* activities with engaged *blades* and *shovels* to dry out water bodies. Pet. App. 8-9; see *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 901, 920-921, 926-927 (5th Cir. 1983).

The Ninth Circuit also rejected petitioners' argument that deep plowing is in any event exempt from regulation (and not recaptured) under the CWA's exemptions for "normal farming * * * and ranching activities such as plowing." Pet. App. 9-10. The Court held that "even normal plowing can be regulated under the [CWA] under the so-called 'recapture' provision," and that *any* farming activity that "changes a wetland's hydrological regime is non-exempt." *Ibid.*

Finally, affirming the $1.5 million civil penalty, the Ninth Circuit ignored conflicting authority in interpreting 33 U.S.C. § 1319, Pet. App. 209, to allow assessment of the maximum daily penalty for each time a plow shank crossed a drainage without regard to the number of days on which the activity occurred. Pet. App. 13-16.

Dissenting, Judge Gould would have held "that the return of soil in place after deep plowing" does not produce a regulated "discharge" because it "does not involve any significant removal or 'addition' of material to the site." Pet. App. 18-22. Judge Gould would also have held the farming exemptions applicable to "deep plowing." Pet. App. 21. He stated the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops

* * * more profitable than grazing" and that farmers have engaged in such agricultural pursuits "from the beginning of our nation, and indeed in colonial times." Pet. App. 18. In Judge Gould's view, the majority acted without clear Congressional direction in prohibiting "a traditional form of farming activity." Pet. App. 20, 22. He complained that the majority "makes new law by concluding that a plow is a point source and that deep ripping includes discharge of pollutants into protected waters," and that "the judicial determination that a deep plowing technique constitutes a pollution of navigable waters, with no prior adequate guidance from Congress, goes beyond mere statutory interpretation." According to Judge Gould, the majority's holding rests on "an agency power too unbounded or judicial law making, which is worse." Pet. App. 22.

SUMMARY OF ARGUMENT

I. The CWA authorizes the Corps to regulate under its Section 404 "dredge and fill" permitting program only those activities which produce a "discharge" defined as an "addition" of a "pollutant" (i.e., dredged spoil or fill material) from a "point source." These essential jurisdictional elements are absent in the case of plowing, regardless of its depth, because plowing breaks up, cuts, turns over and stirs native soil in place to prepare it for the planting of crops, and "adds" no materials to the soil. Because it involves no "addition," plowing never involves a regulated "discharge," as consistently recognized by the Corps' and EPA's regulations and by all relevant regulatory guidance until the December 1996 Field Memorandum, issued only after all plowing at issue here had ceased. Recent authority from the D.C. Circuit Court, which dissenting Judge Gould found persuasive, holds even *dredging activities* which add nothing but merely produce "incidental fallback" of already-present native materials back into the same general location do not produce "discharges." Plowing likewise moves soil in place, adding

nothing. Additionally, native soil turned in place is not a "pollutant," since it is naturally occurring in the same quantities and is not in any sense "waste."

Nor do *plows* dragged through the soil reasonably fall within the language of the statutory definition of "point source," because they are not "discernible, confined and discrete conveyances" of pollutants. Soil broken up, turned over and stirred by plows is moved in place, not "confined" or concentrated within any "pipe, ditch, channel, tunnel, conduit, * * * [or] container," through which it is gathered and "conveyed" to another location. Plows are not "conveyances" which carry and transport a farm's or ranch's valuable native topsoil to another location, either by design or effect. No prior case has ever held plowing alone to be a regulated activity or a plow to be a point source.

The CWA's text, structure and legislative history all confirm Congress intended to exclude agricultural sources of water pollution from section 404 regulation by treating them as "nonpoint" sources to be regulated through local management plans developed by the States. Congress' clear focus in enacting the 1972 CWA was to eliminate additions of untreated or inadequately treated waste and toxic pollutants from "end-of-pipe" sources, primarily inadequate municipal sewage treatment facilities and industrial plants, to our nation's waters as part of the waste treatment process.

II. Congress emphatically reaffirmed and clarified the existing exclusion of plowing from regulation in the 1977 CWA "farming exemption" amendments in Section 404(f)(1)(A). Following these amendments, Corps and EPA regulations continued to exclude plowing entirely from Section 404 regulation as an activity which "will never involve a discharge of dredged or fill material." The Corps' RGL 86-01 stated "plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limita-

tions," thus recognizing plowing could never be "recaptured" under Section 404(f)(2) based on any alleged effects on "waters."

The legislative history of the 1977 amendments confirms Congress never intended to regulate plowing under Section 404 and did not consider it to involve point source discharges. As to such activities, Congress' intent was to reaffirm their existing exclusion from regulation through an express statutory exemption, so as to avoid any possible confusion or future regulatory or judicial overreaching.

Even if plowing did involve a "discharge," it is exempt from regulation because the "normal farming" exemption applies and the "recapture" provision does not. The plain text of the recapture provision requires that significant navigable waters purposely be converted to uplands so as to support an otherwise exempt use to which they were not previously subject in their natural state. In other words, filling a previously unplowable swamp, marsh or bog so that it could *thereafter* be dry enough to be plowed and farmed would be a "recaptured" activity to which any alleged "discharges" from plowing would be merely "incidental." By contrast, plowing semi-arid ranchland already used to grow forage, which was always plowable and farmable in its natural state, to plant new higher-value crops, is a primary, traditional and normal farming and ranching activity. *Plowing alone*, like that engaged in here by Borden Ranch, is not merely "incidental" to some other activity whose purpose is to convert waters to an upland use to which they were not previously subject. The Corps' and Ninth Circuit's interpretation of the recapture provision to apply whenever plowing or other normal farming or ranching activity changes the hydrology of a wetland would effectively swallow the exemption enacted by Congress.

III. The Ninth Circuit majority erred in calculating the civil penalty by calculating each *pass* of the deep plow through "waters," rather than each *day* of plowing, as a separate violation unit for which the maximum penalty of "$25,000 per day of violation" could be imposed. 33 U.S.C. § 1319(d) contemplates maximum penalties will be calculated not in terms of the total number of individual violations of the same type or category, but in terms of *daily violation units*. Since Tsakopoulos' alleged violations here *all* fell into the same distinct category – "discharge" of native soil "fill" from a plow without a permit – the number of *daily* violations of this category should have been totaled and multiplied by $25,000 to reach the maximum penalty figure used as the starting point for downward adjustment. The Ninth Circuit's contrary approach violates the rule of lenity, is arbitrary and simply reads the "per day" language out of the statute based on supposed "policy" goals which are inapposite to this context, in which Mr. Tsakopoulos' violations of the Act's strict liability scheme were neither alleged by the government nor found by the district court to be intentional.

ARGUMENT

I. DEEP PLOWING DOES NOT INVOLVE A "DISCHARGE" OR "ADDITION" OF "POLLUTANTS" FROM A "POINT SOURCE" AND IS THEREFORE NOT SUBJECT TO REGULATION UNDER CWA SECTION 404.

The Ninth Circuit erred when it held that deep plowing involves a "discharge" that "adds" pollutants from a "point source" and thus requires a "dredge and fill" permit from the Corps. Deep plowing neither "adds" materials to a wetland under any reasonable interpretation of that word, nor are plows in any of their varieties "point sources" which "confine," carry or "convey" "pollutants" from one location to another in the manner of a pipe, ditch or container. Native

farm soil plowed to plant crops is not waste and, hence, not a "pollutant." The text, structure and legislative history of the Act show Congress purposely excluded agricultural activities as a class from Section 404's regulation of "point sources" of pollutants, and assigned to the States and their local agencies primary responsibility for identifying, studying, planning, and regulating with respect to such traditionally local land use matters.

A. Plowing Does Not Constitute An "Addition" Of A "Pollutant" Under The Plain Language of the CWA.

"Section 404(a) grants the Corps authority to issue permits 'for the discharge of dredged or fill material into the navigable waters at specified disposal sites.'" *SWANCC*, 531 U.S. at 163; Pet. App. 210. "Discharge" or "discharge of pollutants" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12), (16). Pet. App. 212, 213.

The Ninth Circuit opinion concedes that "no new material [is] 'added'" to waters by deep plowing, yet holds that a "pollutant" is nevertheless added because underlying "soil was wrenched up, moved around, and redeposited somewhere else." Pet. App. 8. In other words, *plowing* occurred.

Unlike regulated "point source" discharges, plowing does not extract, hold, confine, collect or remove native materials and then "redeposit" them. Not even "incidental fallback," held not to be a regulable discharge in *National Mining*, occurs during plowing, since the plowed soil never loses contact with the immediately-surrounding ground. Plows cut through, break up and turn soil in place while adding nothing and redepositing nothing.[12]

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[12] As Judge Gould stated, "[b]ecause deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is

The Ninth Circuit's decision also conflicts with applicable Corps and EPA regulations. "Fill material," as the applicable regulations and common sense suggest, is material moved in quantities to create dry land, fill a hole, build a structure, or the like. 33 C.F.R. §323.2(e),(f). Any incidental movement of soil during plowing simply does not fit this language, as explicitly acknowledged by the Corps' and EPA's regulations stating that plowing "will never involve a discharge of dredged or fill material." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4); Pet. App. 216, 218. Previously, in *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d at 1168 (9th Cir. 1998), the Ninth Circuit held that a solid waste landfill leak detection and collection system placed in wetlands did not constitute "fill material" because its "primary purpose" was not to replace an aquatic area with dry land or change the bottom elevation of a water body. See also *National Mining*, 145 F.3d at 1401, fn. 1 (noting "primary purpose" requirement for defining "fill material").[13] Under a "primary purpose" test, deep plowing does not produce "fill material" where its purpose is to enhance and revitalize soil for planting new crops, as here.

The reasoning of *National Mining* is persuasive on the "addition" requirement. The D.C. Circuit there invalidated the

not controlling." Pet. App. 20. Judge Gould recognized *National Mining* could not be distinguished and was persuasive on the "addition" issue because plowing produces, at most, "incidental fallback" of native soil which cannot be held to be a "discharge."

[13] Subsequent to the Ninth Circuit's decision, the Corps revised its regulations defining "fill material" to eliminate the "primary purpose" requirement. See 67 Fed. Reg. 31129 (May 9, 2002), amending 33 C.F.R. § 323.2(e). The new regulations are obviously inapplicable to this case. They are also inconsistent with the express "purpose" requirement of the CWA's "recapture provision." *See* 33 U.S.C. § 1344(f)(2) (recapture applies where purpose of activity is converting wetland to use to which it was not previously subject). In any event, even under the new rule, plowing would not be regulated because it does not "discharge" a pollutant and does not "replace" navigable waters.

Corps' and EPA's so-called "*Tulloch* Rule," purporting to regulate any redeposit from any excavation activities, and held: (1) "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back," *National Mining*, 145 F.3d at 1404; and (2) such "incidental fallback" (which occurs when material is dredged from a water, and some of it falls back off the dredge bucket into the same general location) is not a regulated "discharge." *Id.* at 1403. *National Mining* distinguished *Rybachek*, 904 F.2d 1276 – which it found was "the strongest authority for the agencies' position," *National Mining*, 145 F.3d at 1406 – as involving a regulable discharge which was the "discrete act of dumping leftover material into the stream after it had been processed" rather than the "incidental fallback of dirt and gravel" to its original location. *Id.*, at 1406. The statute's use of the word "addition," as well as the phrase "specified disposal sites," shows "that Congress had in mind either a temporal or geographic separation between excavation and disposal which simply does not fit incidental fallback." *Id.*, at 1410, Silberman, J., concurring.

Not only does deep plowing "add" nothing, but the soil it moves in place is not a "pollutant" under the plain language of 33 U.S.C. § 1362(6), Pet. App. 211. Productive soil is obviously not "dredged spoil, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt," or "industrial or municipal waste." It is not "biological materials" within any normal or reasonable construction of that phrase, since it is not the "waste material of a human or industrial process." See *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, __ F.3d __, 2002 WL 1792498, *6 (9th Cir. 2002) (opn. by Gould, J.) (applying doctrine of *ejusdem generis* and analyzing purpose of CWA in holding that the term "pollut-

ant" does not encompass naturally occurring biological matter such as shellfish chemicals, shells and feces emitted from mussel harvesting raft). Native soil turned in place by plowing is not "solid waste" or "agricultural waste," either, because native topsoil is not *waste* at all, but, rather, a valuable natural resource which is enhanced and revitalized for use in growing crops, not discarded, by plowing.

In short, under the statute's plain text requiring an "addition" of a "pollutant," deep plowing is not a "discharge" subject to Section 404's permit requirements. There can be no "addition" of "pollutants" from an activity where there is no "addition" of material. Plowing does not add new materials or "pollutants," but merely cuts, breaks up and turns over existing soil in place to prepare it for the planting of crops.

B. Plows Are Not CWA-Regulated "Point Sources."

Another essential element of Section 404 permitting jurisdiction is that the "pollutant" must be "added" from a "point source," defined as "any discernible, confined and discrete conveyance." Pet. App. 212. This statutory definition "evoke[s] images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). A plow is not a "point source" since it is neither "confined" nor a "container," nor does it function as a "conduit" or "conveyance" of pollutants/materials from one location to another. No prior case has ever held a plow is a "point source," and there are no agency regulations supporting the treatment of plows as point sources.

The plain language of the statute defining "point source" provides numerous illustrative examples, but plows are neither described nor listed in the statute, nor are they similar in

any significant respects to the numerous examples listed.[14] Plows lack the defining characteristics of any "discernible, confined and discrete conveyance" such as a "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The common characteristic present in *all* of these types of statutorily-listed "point sources" – and lacking in plows – is their ability to *confine*, *contain* and *concentrate*, and then to *carry* and *convey* – as a conduit – pollutants from one discrete location to another. Plows are not *ejusdem generis*[15] with the enumerated examples of a "confined and discrete conveyance." Plows break up, cut, stir and turn soil in place – they do *not* confine, con-

[14] Given Congress' concern for and intimate familiarity with agricultural activities, and its careful treatment of the same in the CWA, it is inconceivable that Congress would not have expressly included "plows" among the illustrative examples of "point sources" listed in 33 U.S.C. § 1362(14), either in 1972, 1977 or thereafter, had it actually intended to regulate them as such. Regulation of non-point source pollution is left primarily to the States. E.g., 33 U.S.C. § 1288(b)(2)(F); see S. Rep. No. 95-370, at 76 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4401 (normal farming activities to be regulated as non-point sources by State and local agencies).

[15] "Of the same kind, class, or nature." Black's Law Dictionary (1979 ed.), p. 464. "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). "It is a well-settled principle of statutory construction that where specific words precede or follow general words in an enumeration describing a particular subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words." *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250, 1258 (D.C. Cir. 1978), and authorities cited; *see also Association to Protect Hammersley, etc.*, 2002 WL at *6 (9th Cir. 2002) (applying *ejusdem generis* doctrine to CWA's statutory definition of "pollutant").

tain, carry and convey it, in the fashion of a shovel, bucket, backhoe, grading blade, or other "confined conveyance."

Moreover – and setting aside for the moment the express statutory exemption for plowing in Section 404(f)(1)(A) – it would make little sense to hold Congress intended to include plows, *sub silentio*, in the definition of "point source" while expressly exempting "agricultural stormwater discharges and return flows from irrigated agriculture." § 1362(14). To regulate supposed individual "discharges" from instances of plowing as "point source" discharges, while broadly exempting all discharges constituting the "runoff" from all plowed fields would be the height of irrationality. Where construction of a statute would not only contravene its plain language and defy common sense, but would lead to absurd and irrational results, the Court should reject it. *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")

The Ninth Circuit's reliance on a Fifth Circuit case finding "*bulldozers* and *backhoes*" *may* constitute "point sources" is misplaced. In *Avoyelles*, bulldozers and backhoes were not used for plowing but for major earthmoving, excavation and ditching functions. 715 F.2d at 901, 920-921, 926-927.[16] The bulldozers and tractors (not backhoes) pulling deep plows on the semi-arid Borden Ranch were indisputably not engaged in grading, excavation or ditching, but were simply using their motive power, as horses and oxen did in earlier times, to drag normal farming implements – deep

[16] In *Avoyelles*, the owner of a 20,000-acre tract leveled the property, cut down timber and vegetation with bulldozers with shearing blades, pushed, burned, raked and disked all these materials into the land's low spots to raise and level it, and further dug a drainage ditch, for the express purpose of filling and drying out a swampy Louisiana flood plain so that, thus altered from its natural state, it could *thereafter* be plowed and farmed for soybeans.

plow shanks – through the soil to break it up, and turn it in place, i.e., *to plow* to prepare for crops. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). Neither *Avoyelles* nor any other reported decision,[17] until *Borden Ranch*, has held that plowing alone produces a "point source" discharge.[18]

C. The Text, Structure, And Legislative History Of The CWA Confirm That Congress Intentionally Excluded Agriculture From Section 404 Regulation.

Section 101(b) of the CWA states:

> "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of

[17] *United States v. Akers*, 785 F.2d 814, 816-817 (9th Cir. 1986) involved "extensive [dike building], grading, leveling, drainage and water diversion to convert [2,889 acres of] wetlands to farmland suitable for growing upland crops." The Ninth Circuit there refused to endorse the government's extreme argument that "discing of soil" considered in isolation was a "point source" discharge. *Id.* at 819-820 (holding farmer exemptions inapplicable because court "cannot view Akers' plowing, discing and seeding in isolation" from the other activities). See also *In re Alameda County Assessor's Parcel*, 672 F.Supp. 1278, 1281 (N.D. Cal. 1987) ("graders and a bulldozer" used "to spread earthen fill * * * brought onto the property and dumped from large earth-moving trailer trucks"); *United States v. Larkins*, 657 F.Supp. 76, 85 (W.D. Ky. 1987) ("use of earthmoving equipment to construct earthen dikes and levees on wetlands"); *United States v. Larkins*, 852 F.2d 189, 190 (6th Cir. 1988) (defendants "dug drainage ditches, cut timber, blasted beaver dams, and began filling low spots" on 10-12 acres covered with knee deep water).

[18] The issue is critical to the nation's farmers and not limited to deep plowing, as the agencies are now going beyond even their own unauthorized December 1996 Field Memorandum and attempting to regulate even the shallowest forms of plowing – including disking – under the authority of the *Borden Ranch* decision. See, e.g., Pet. App. 41, 48 (district court summary judgment order finds both deep ripping and *disking* are regulated).

> States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. * * *"

33 U.S.C. § 1251(b); see Vol. 1, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (hereafter "1972 LEG. HIST.") at 3, 765.

In addition to its provisions regulating "point source" discharges through "command and control"-type permitting requirements, the CWA directs the States to identify areas with substantial water quality control problems and to develop corresponding area-wide waste treatment management plans. 33 U.S.C. § 1288(a),(b); 1 1972 LEG. HIST. 26-27. Such plans must, *inter alia*, include "a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F); see 1 1972 LEG. HIST. 28.[19] The Administrator's role under Section 304(e) was limited, in relevant part, to issuing "information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from – (A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands." 33 U.S.C. § 1314(f)(A); 1 1972 LEG. HIST. 38.

As summarized by one commentator, the CWA leaves regulation of "nonpoint source pollution" primarily to the

[19] The phrase "return flows from irrigated agriculture, and their cumulative effects," was added as part of the 1977 CWA amendments. Pub. L. 95-217, § 33(a).

States, and "most pollution produced by agricultural activities comes from nonpoint sources." Gerald A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. Davis l. Rev. 461, 462 (1990). Congress recognized the problem of agricultural pollution, but "chose to address [such] nonpoint source pollution primarily through the Section 208 planning process." *Ibid.* See also 1 1972 LEG. HIST. 354 (Rep. Blatnik remarks re "agriculture and nonpoint sources of discharge"); 430 (Rep. Cleveland remarks that CWA does not prohibit agricultural runoff pollution); 645 (colloquy between Reps. Henderson and Wright that "point source" definition covers "only those concentrated animal feeding operations which would collect and concentrate waste for discharge through a definite point source outlet").

The 1972 CWA focused on municipal and industrial "point source" discharges and excluded agriculture from this category. See *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d at 646-647, and numerous statutes and authorities cited therein. The "singlemost" and "most widespread and acute" problem addressed by the CWA was "inadequate municipal sewage treatment." 1 1972 LEG. HIST. 97 (Rep. Jones). Foremost was the goal of eliminating "discharges" of pollutants to navigable waters by 1985, and providing needed municipal waste treatment facilities such that "streams and rivers are no longer to be considered part of the waste treatment process." 1 1972 LEG. HIST. 120-121 (Sen. Muskie); see *id.* at 132 ("Congress has said that it wants to see the end of community and industrial discharges by 1985") (Sen. Williams).

To achieve its goals of eliminating discharges of waste and toxic pollution from community and industrial point sources, while leaving nonpoint source agricultural activities for further study and state regulation, Congress employed the specific terms discussed and analyzed above – "discharge,"

"addition" and "point source" – which have specific meanings. As remarked by primary CWA sponsor Senator Muskie: "The term 'discharge' is a word of art in the legislation. It refers to the actual discharge from a point source into the navigable waters, territorial seas or the oceans." 1 1972 LEG. HIST. 178; see also *id.* at 762-763 (Rep. Blatnik House Committee on Public Works Report emphasizing importance of CWA's definitional terms such as "discharge of a pollutant" and "point source" which "have very specific and technical meanings"); *id.* at 812. "Point sources" were envisioned by Congress as affecting "a given stretch of water" (*id.* at 246) (Rep. Harsha remarks on House Consideration of Conference Committee Report), and being subject to "effluent limitations" made on the "basis of classes and categories of point sources, as distinguished from a plant-by-plant determination." *Id.* at 254 (Rep. Dingell, quoting Conference Report at p. 121); *id.* at 789-791, 798 (referring to application of "best practicable control technology" to industrial "end of the pipe" point sources).

As stated by Senator Dole: "Most sources of agricultural pollutants are generally considered to be nonpoint sources." 2 1972 LEG. HIST. 1298. Numerous Legislators, including Senator Muskie, unanimously stated their views that the CWA does not regulate agricultural activities as "point source" discharges subject to the Act's permitting requirements. *Id.* at 1254 ("The bill also requires the Administrator to conduct research into better methods of controlling pollutants from nonpoint sources such as agricultural runoff") (Sen. Muskie); 1275 ("I think we all recognize that the characteristics of agricultural pollution and the best means of controlling it are quite different from those associated with urban/industrial pollution. Several portions of this bill apply specifically to the control of pollutants from nonpoint agricultural sources," citing research and planning provisions of CWA §§ 104(d)(1)(b), 105, 105(d) and 304(e)) (Sen. Eagleton); 1276 (reference to "nonpoint sources, including agri-

cultural activities") (Sen. Eagleton); 1294 (agricultural pollution problems involve "nonpoint sources"; "nonpoint source of pollution is one that does not confine its polluting discharge to one fairly specific location, such as a sewer pipe, a drainage ditch, or a conduit") (Sen. Dole); 1314 (in discussing limited scope of CWA, Sen. Muskie comments that effective technology is lacking to deal with nonpoint source problems such as agricultural runoff, control of which would involve land use controls); 1470 (Report of Senate Comm. On Pub. Works No. 92-414, accompanying S. 2770 discussing agriculture generally as nonpoint source); 1513-1514 (supplemental views of Sen. Dole to same effect).

While the plain meanings of the terms "discharge," "addition" and "point source" as set forth and defined in the text of the CWA compel the conclusion that plowing does not produce a "point source" discharge regulated under Section 404, that conclusion is also inescapable from a review of those terms in the context of the structure and legislative history of the 1972 CWA discussed above. This conclusion is further buttressed by the later 1977 CWA amendments and their legislative history.

II. THE CWA'S "FARMING EXEMPTIONS" REAFFIRMED THE EXISTING EXCLUSION OF "NORMAL FARMING * * * AND RANCHING ACTIVITIES SUCH AS PLOWING" FROM SECTION 404 REGULATION.

It is unnecessary to reach the issue of interpretation of the CWA's farming exemptions to decide this case in petitioners' favor if the Court concludes that deep plowing produces no regulated point source "discharge" of "pollutants" so as to fall under the Corps' Section 404 permitting jurisdiction. However, the plain language of Section 404(f), the agencies' own regulations and guidance, and the relevant legislative history all powerfully reaffirm the conclusion that Congress

never intended to regulate plowing as a point source discharge under Section 404.

A. The Plain Language of Section 404(f)(1)(A) Broadly Exempts The Plowing Of Farmland or Ranchland to Plant Crops From Section 404 Regulation.

Congress' 1977 amendments were intended to prevent regulatory overreaching and make clear that no permit is required for any alleged "discharge"

> from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.

33 U.S.C. § 1344(f)(1)(A); Pet. App. 210. By use of the phrase "such as" in the statute, Congress has defined "plowing" as a "normal farming * * * and ranching activity." [20] This broad exemption clearly shows "that Congress emphatically did not want the law to impede these bucolic pursuits." *National Mining*, 145 F.3d at 1405.

Congress provided a facially narrow "recapture" provision removing from the exemption:

> Any discharge of dredged or fill material into the navigable waters *incidental* to any activity having as its ***purpose*** *bringing an area of the navigable waters into a use to which it was not previously subject*, ***where*** the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.

[20] Where, as here, Congress has already directly spoken to the topic by specifically defining statutory terms, such as "normal," conflicting regulatory definitions of the same term are not accorded *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

33 U.S.C. § 1344(f)(2); Pet. App. 211, emph. added. On its face, this exception is not concerned with activities – like like plowing productive farm or ranch land – that do *not* produce discharges. Nor does it address a change from one agricultural crop to another, like the change here from pasture and forage crop to orchard/vineyard crop. Rather, it addresses *intentional conversion of unproductive wetlands to drylands on a significant scale so as to enable* normal farming activities *which could not otherwise occur*. *In re Carsten*, 211 B.R. 719, 735 (Bkrtcy. D. Mont. 1997) (recapture provision addresses extensive conversion of unproductive wetlands to drylands on significant scale, not minor conversions of small areas of marginal waters to uplands).

Thus, where activities are done for the primary purpose of draining and drying out significant water bodies to convert them to uplands capable of being farmed – i.e., the *Avoyelles* situation – the exemption cannot be claimed on the grounds that otherwise unregulated farming activities, such as plowing, are later performed "incidental to," i.e., as a "minor concomitant," American Heritage Dictionary Of The English Language, New College Ed. (1975), p. 665, of the primary conversion project. This interpretation is compelled by the plain language of the "farming exemptions," Congress' intent to meaningfully exempt normal farming activities from onerous federal regulation under the CWA's "point source" program, and related statutes.[21]

[21] Congress subsequently enacted so-called "Swampbuster" provisions in the 1985 Food Security Act ("FSA"). 16 U.S.C. §§ 3821-23; Pub. L. 99-198, 99 Stat. 1507. Under the FSA "there will be liability for conversion of a wetland *if it is manipulated 'for the purpose or to have the effect of' making the land farmable." Downer v. U.S. By And Through Dept. of Agriculture,* 894 F.Supp. 1348, 1356 (D.S.D. 1995), emph. added, aff'd 97 F.3d 999 (8th Cir.); see 16 U.S.C. § 3821(c) (listing "draining, dredging, filling, leveling" – but not "plowing" – as wetland conversion activities). Statutes *in pari materia* are construed together. *Erlenbaugh v.*

The Ninth Circuit held petitioners' deep plowing ranch land used to grow forage to plant vineyards and orchards instead was not exempt and was "recaptured" because "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject.'" Pet. App. 10. But the statute does not refer to *any* "new use." The recapture provision's first prong is satisfied where a discharge is "incidental" to an activity "having as its purpose bringing an area of the **navigable waters** into a use **to which it was not previously subject**," 33 U.S.C. § 1344(f)(2). Whether an area of "waters" is "subject" to plowing and upland farming use prior to purposeful conversion activities obviously depends on how wet it is and for how long per growing season. Because of its natural character, land may be readily "subject" to agricultural use without ever having been actually subjected to such use. For example, land containing soils classed as prime farmland, which becomes paved over with a shopping mall, may well have previously been "subject" to farming use, even though such use never occurred, i.e., the land was not previously "subjected" to such use. Likewise, one may be "subject" to the laws of the land, or to the criticism of others, while never having actually been "subjected" to either prosecution under the laws or criticized by peers. By "previously subject" to, Congress clearly meant previously capable of or amenable to a use in its natural condition.

United States, 409 U.S. 239, 243 (1972); 2B Norman J. Singer, Sutherland Statutory Construction § 51.02 (6th ed. 2000). "Wetlands" subject to being farmed by use of "normal cropping or ranching practices" (i.e., plowing) as a result of their "natural condition" (e.g., drought or, as here, regular dryness in a semi-arid region throughout the long growing season) are *not* deemed converted (i.e., brought into a use to which they were not already subject) when so farmed. 16 U.S.C. § 3822(b). Accordingly, *merely* plowing (without more) triggers neither FSA farm subsidy ineligibility under "Swampbuster" *nor* CWA Section 404's recapture provision.

In addition, and contrary to the statutory language, the court treated as an independent reason for recapture that plowing activity altered the hydrology of a wetland. Pet. App. 10. On that reasoning, *any* change in agricultural crop or practice – even plowing crop land to lie fallow – would bring any kind of plowing within federal regulation. CWA Section 404's exemption for plowing, Pet. App. 218, would be rendered virtually meaningless as a practical matter. As observed by one commentor:

> The § 404(f)(2) recapture provision must be given a reasonable reading or it would swallow the exemptions. Any of the exempted activities impair the waters to a degree, but the government does not require a permit for those exempt activities that result in minor impacts to the nation's waters, including wetlands.
>
> Margaret N. Strand, *Federal Wetlands Law, Part I, The Clean Water Act § 404 Program*, 23 Envtl. L. Rep. 10185, 10209 (1993).

The Corps and the Ninth Circuit effectively treat Section 404(f)(1) as a mere "grandfather" clause and assume Congress meant to regulate under Section 404 all farming activities except those already being conducted in the very same manner currently or in the recent past. Under this erroneous view, the exemptions would not apply at all to plowing historically ranched land for the first time either to improve the forage (because plowing changes hydrology) or to plant non-forage crops (because that is a change in use). This makes no sense because the statute's plain language tells us that by definition the *plowing of ranchland to plant crops* is, in the eyes of Congress, a normal farming and ranching activity which is exempt from Section 404 regulation. See § 1344(f)(1)(A) (referring to "normal farming * * * and ranching activities such as plowing * * * for the production

of food, fiber"). To hold that the *very activity* addressed and *defined* by the statute itself *as* a normal agricultural activity – plowing ranchland to plant crops – is *never* "normal" nor exempt flies in the face of the exemption's plain meaning.

B. The Legislative History Confirms Congress Intended To Clarify The Existing Exclusion of Plowing Under Section 404.

The CWA's legislative history refutes the Ninth Circuit's crabbed interpretation of the "farming exemptions," showing that Congress did not newly exempt plowing from statutory regulation mid-course, but that it never intended to regulate mere plowing at all under the CWA. Senator Muskie, a primary CWA sponsor, *Avoyelles*, 715 F.2d at 915, explained that the 1977 amendments "tr[y] to *free from* ***the threat of regulation*** those kinds of man made activities which are sufficiently *de minimis* as to merit general attention at the state and local level and little or no attention at the national level." Vol. 3, "A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977" (1978) (hereafter "1977 LEG. HIST.") at 645 (CR36, ER489) (Senate Report on S. 1952, 95th Cong.), emph added; *see also id.* (Vol. 4) at 924 (ER 492) (Sen. Domenici); 181 (ER482) (President's comments); 289, 351, 524 (ER481, 483, 487) (Sen. Stafford). Where, as here, plowing is a permitted farming activity under locally-enacted agricultural zoning and other State and local regulations, Congress intended the federal government to have no permitting role under the CWA.

Senator Muskie recognized the 1972 CWA's basic objective was "to eliminate toxic pollutants in toxic amounts" from the nation's waters, *id.*, 426, ER484, and stated of the "farming exemptions":

> The conferees agree to adopt *the Senate amendment that* ***legislatively clarifies the exclusion of certain activities that do not typically involve point source discharges of dredged or fill material*** * * * *The conferees have adopted the Senate's explicit approach for* ***clarifying that plowing, seeding, cultivating, harvesting,*** *minor drainage, and soil and water conservation practices performed on uplands* ***were not intended to require section 404 permits. Such exemptions were provided by the Corps of Engineers' regulations under the current law.*** *[¶]* * * * *While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.*

ER485, emph. added; 3 1977 LEG. HIST. 475; *see also* 4 1977 LEG. HIST. at pp. 919-920 (ER490-491) (Chafee comments); see ER495, 494, 494. The legislative history clearly shows Congress never intended to regulate pure plowing under the CWA and never even considered it to produce "discharges."

The Corps asserts, Opp. Br. at 13, that Congress would not have expressly exempted plowing and other normal farming activities in the 1977 CWA amendments unless it believed such activities produced point source "discharges" which were otherwise within the scope of Section 404.[22] Yet, as amply illustrated by the *National Mining* court's pointed rejection of this position, 145 F.3d at 1405, and by Senator Muskie's above-quoted comments, Congress not uncommonly takes a "belt and suspenders" approach to clari-

[22] This argument plays "ostrich to the substantial history behind the amendment," ignoring that "it is not 'pointless' to adopt a clarifying amendment in order to eliminate opposition to a bill," or, indeed, in any circumstances where legislators believe clarification is necessary because of the risk of regulatory misinterpretation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 128 (dis. opn. of STEVENS, J.).

fying exclusions to reassure particular constituencies and prevent regulatory overreaching.[23]

Moreover, the Legislative history suggests that whatever Congress' view with respect to whether *other* expressly exempted activities – such as dam, levee and bridge maintenance (§ 1344(f)(1)(B)), stock pond and irrigation ditch construction or maintenance (§ 1344(f)(1)(c)) – actually produced "discharges," it never believed that the normal farming activities listed in Section 404(f)(1)(A) did so. Rather, in endorsing the substance of Senator Muskie's above-quoted comments, other Legislators confirmed that the normal farming amendment legislatively clarified *an existing exclusion* from the Act. As echoed by Rep. Hammerschmidt:

> On the positive side, we will now have for the first time *statutory recognition* that normal farming, ranching and silviculture activities do not belong in this [Section 404] permit program. These exemptions *reemphasize* that *Congress never intended these activities to be considered discharges of dredged or fill material.*

33 1977 LEG. HIST. 351, emph. added. *See also, id.* at 348 (Corps' pre-existing regulations also made clear "that plowing, seeding, cultivating, and harvesting for the production of food, fiber, and forest products are not included in the Section 404 program") (Rep. Roberts); 420 (amendments clarified that plowing and other normal farming activities did not involve point source discharges and "were not intended to require Section 404 permits") (Rep. Harsha); 485 (conferees agreed to adopt exemptions "to prevent over-regulation of activities that have little or no effect on the aquatic environment. The bill includes the clarification that permits are not required for certain normal farming activities such as plowing and seeding which are not discharges of dredged or fill material") (Sen. Stafford); 524 ("Senate amendment to Section 404 * * * clarifies the exclusion of activities that do not involve point source discharges, such as plowing and upland conservation activities") (Sen. Baker); 529 (exemption "legislatively clarifies the exclusion of certain activities that do not involve point source discharge" and that "normal farming, ranching and silvicultural activities such as plowing * * * were not intended to require 404 permits") (Sen. Wallop); 644, 869 (normal farming and similar activities "should not and cannot be regulated by the Federal Government") (Sen. Muskie); 911 ("plowing" is among the exempt "earth moving activities that do not involve discharges of dredged or fill materials into navigable waters") (Sen. Stafford); 924 (Congress "never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that") (Sen. Domenici).

This understanding of Congress' intent underlying the Section 404(f)(1)(A) "farming exemptions" – as clarifying certain activities' non-regulated status – is explicitly confirmed in colorful language by one scholar otherwise critical of this Court's analysis of CWA *geographic* jurisdiction:

> In addition to stock and farm ponds, irrigation ditches, and temporary sedimentation ponds * * * § 404(f) also

[23] For example, as noted by Representative Roberts: "Section 33 of the conference report exempts return flows from irrigated agriculture from all permit requirements under section 402 **and** recognizes that this activity is not a point source within the meaning of the [CWA]." 3 1977 LEG. HIST. 318, emph. added. Since, as with Section 404, Section 402 requirements apply only to point source discharges, under the government's argument it would be redundant to both define "point source" to exclude irrigation return flows **and also** provide an express Section 402 permit exemption. Yet that is the approach Congress took. *See* 33 U.S.C. §§ 1342(a), (l)(1), 1362(14).

exempts a number of activities that apparently have nothing to do with water at all. Why would Congress exempt them from § 404's requirement for a permit to discharge into navigable waters, however defined? The legislative history indicates that Congress may have wished to exclude certain activities from § 404 in specific terms to reassure particular constituencies even when it was otherwise clear that § 404 would not reach those activities. For example, the House bill to amend § 404 * * * exempted normal farming, silviculture, and ranching activities * * *, activities that clearly would not have been subject to the jurisdiction of the section in any case. * * * In other words, in the House at least, one stake through the heart of the vampire was not considered enough.

William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 Envtl. L. Rep. 10741, 10755 (2001), fns. omitted.

Nor does the legislative history, fairly read, support the extremely narrow reading of the farming exemptions and broad reading of the recapture clause espoused by the Corps. In responding to Senator Dole's concerns on behalf of his agricultural constituents regarding whether minor drainage and filling activities by farmers on low-lying areas to improve crop production would require a Section 404 permit, Senator Muskie answered in the negative, stating:

> Mr. President, the drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poorly drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. **Permits are required only where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area**. * * * The Corps[']definition requires a

> prevalence of aquatic vegetation and is intended to describe only the true swamps and marshes that are part of the aquatic ecosystem [¶] **The type of drainage you have described in many cases would not require a permit since the drainage could be performed without discharging dredged or fill material in water, or would occur in areas that are not true marshes or swamps intended to be protected by Section 404**.

4 1977 LEG. HIST. 1042-1043 (Sen. Muskie), emph. added.

It has not escaped some scholars' attention that this legislative history has either been ignored or misconstrued by those courts which have in *dicta* "narrowed" the exemption:

> The remarks quoted by the Court **appear to enlarge the exemption rather than narrow it**. Senator Muskie specifically stated several times that Section 404 jurisdiction was intended to apply only to true swamps and marshes. **His comments, which were intended to placate Senator Dole, imply that normal farming operations were not intended to be curtailed in the extensive fashion that has evolved from the application of the CWA**.

Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 U.C.L.A. J. Envtl. L. & Pol'y 41, 58-59 (1991), emph. added.

Requiring a farmer to undergo the far-reaching CWA Section 404 permitting process in order to plow his or her land for a new crop would entail significant burdens. Permits require a "public interest review" as set forth in 33 C.F.R. § 320.4(a), which involves a "careful weighing" by the Corps of general environmental concerns, wildlife values, land use,

water quality, food and fiber production, considerations of property ownership, and a host of others. The farmer or rancher regulated under Section 404 would be required to engage in a lengthy and costly permitting process, hiring of experts and filing of detailed documents, so that the Corps can conduct what is essentially general land use regulation and management. Virginia Albrecht and Bernard Goode, Wetland Regulation in the Real World (1994), document lengthy delays in processing Section 404 applications, observing that only 30% of permit applications are ultimately approved. Most applications (63% in Albrecht & Goode's study) are withdrawn, usually because the Corps makes demands that the applicant cannot or does not want to comply with. Congress plainly intended that farmers and ranchers engaged in normal farming activities not be subjected to such burdens simply in order to make normal productive use of their land.

C. The Agencies' Regulations Treat Plowing As A "Non-Discharge" Excluded Entirely From Section 404's Provisions, Including The "Recapture Provision."

The implementing agency regulations defining "plowing" expressly exclude *all* plowing from CWA regulation. 33 C.F.R. Section 323.2(f), for example, provides "fill" is *addition* of material and *never* includes plowing. The Corps' regulations provide:

> *Plowing means* ***all forms of primary tillage****, including moldboard,* ***chisel****, or wide-blade plowing, discing,* ***harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. * * * Plowing as described above will never involve a discharge of dredged or fill material.***

Pet. App. 216, emph. added; see Pet. App. 218 (parallel EPA regulation).[24]

The regulations clarifying that plowing does not involve a discharge, and is therefore excluded from Section 404 regulation, have been in effect continuously both prior to and after the 1977 "farming exemption" amendments. See pp. 4-6, *supra*. RGL No. 86-01, issued February 11, 1986 by the Corps, and entitled "Exemptions to CWA – Plowing," states in pertinent part:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of

[24] The regulations also state that "plowing" "does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetlands is not plowing." *Ibid.* On its face, this language appears designed merely to distinguish grading, blading and other non-exempt purposeful wetlands conversion activities from true plowing to prepare land for crops, and to clarify that the definition of plowing does not encompass such disparate earth-moving activities. To the extent the Government misreads the language of its regulation to suggest that any form of plowing used on farm or ranch land to break up, cut, turn over and stir the soil to prepare it for crops could *also* constitute the non-exempt "redistribution of surface materials * * * by other means to fill in wetlands," the suggestion renders the regulatory definition hopelessly contradictory and unintelligible. Such a position would mean that even plowing *as defined* in 33 C.F.R. § 323.2(a)(1)(iii)(D) will involve a discharge, depending on its effects on wetlands – a notion which directly conflicts with the regulation's concluding statement that "Plowing as described above will **never** involve a discharge." The "redistribution" language is not entitled to *Chevron* deference for at least two other reasons: (1) plowing produces no "addition" from a "point source," and is by statute a non-regulated activity for that reason; and (2) Congress has already spoken to the topic in the statute and legislative history exempting plowing.

dredged or fill material. Such plowing is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit.

The Corps' longstanding view as expressed in its regulations and RGL 86-01 was absolutely correct. Pure plowing, as properly defined to include any form of primary tillage done to prepare soil for the planting of crops, was excluded from Section 404 regulation from the very beginning. The express exemption in the 1977 statutory amendments served merely to emphatically reaffirm that existing exclusion in order to prevent any possible regulatory overreaching.

The December 12, 1996 Field Memorandum – issued some 10 years after RGL 86-01, almost 20 years after Congress' 1977 CWA amendments, and more than 20 years after the Corps' first regulations exempting plowing – is not only in direct conflict with the statute, and the Corps' own regulations and prior guidance on plowing, but as already noted, was issued only *after* completion of all plowing for which the district court found violations in this case.[25]

[25] The belated and unsupported 1996 memo, by which the Corps and EPA purported to abruptly reverse their previous position on plowing with no relevant statutory or regulatory change, was merely an attempted *ex post facto* justification for the agencies' unjustified treatment of Tsakopoulos and Borden Ranch for the previous three years. The Memo was issued without legal justification, without adequate empirical study or support, and without notice and comment rule making procedures – like a desperate act seeking to justify the actions of a rogue policeman who has already arrested someone for the supposed violation of a non-existent law. "[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines * * * do not warrant *Chevron*-style deference," but are entitled to any respect commanded by their "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). No such respect is due here, where the agencies' about-face conflicts with the plain statutory language and legislative history and impinges on traditional state powers.

D. Expanding Section 404 To Cover Deep Plowing For Crop Production Is Contrary To Congress' Explicit Purpose to Preserve And Protect The Primary Responsibilities Of States Over Land Use.

As this Court recently recognized in *SWANCC*, 531 U.S. at 174, Congress in the CWA explicitly intended that States were to retain traditional and primary power to regulate land and water use. 33 U.S.C. § 1251(b). As recognized by the CWA, farmers' and ranchers' agricultural land uses, including activities like plowing, are traditional matters of state and local, not federal, control. 33 U.S.C. §§ 1288, 1329; Pet. App. 210, 212. Regulating the depth of agricultural plowing intimately involves the regulation of land use – a matter within traditional state and local power. The general policy of the CWA is to study agriculture, but as a "nonpoint" source whose regulation is left to the States. As Judge Gould aptly observed, there is nothing approaching a clear statement or indication in the CWA or its legislative history that Congress intended to regulate plowing – in fact, quite the opposite is true: the unambiguous plain language of the CWA, its legislative history, and authorized agency implementing regulations and guidance all clearly state plowing is **entirely outside of Section 404's provisions**. Where administrative statutory interpretation alters the federal-state framework by permitting federal encroachment on traditional state powers, courts do not apply the deferential standard of *Chevron*, 467 U.S. 837 (1984). *SWANCC*, 531 U.S. at 173. Rather, in such cases, Congress must "convey its purpose clearly" or courts will deem it not to "have significantly changed the federal state balance." *Id.*, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

The Ninth Circuit's expansive and activist definition of the terms "discharge," "addition," "point source" and "pollutant," and unwarranted narrow interpretation of the farming exemptions, so as to include the pure plowing done in this case within the Corps' CWA Section 404 jurisdiction, substantially expands federal power to an unprecedented extent at the expense of State and local authority. *SWANCC* forbids this absent Congress' clearly-expressed intent. As Judge Gould stated: "If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibition of the [CWA] to effectuate Congressional intent, it is an undue stretch for us absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity." Pet. App. 19-20.

III. THE CWA DOES NOT AUTHORIZE IMPOSING MULTIPLE MAXIMUM DAILY CIVIL PENALTIES FOR VIOLATIONS OF THE SAME CATEGORY BY THE SAME POINT SOURCE ON THE SAME DAY.

Even if plowing is a regulable activity under CWA Section 404, the Ninth Circuit nevertheless erred when it held the maximum CWA penalty was properly calculated by multiplying the *number of passes* the district court found were made by the plow through each jurisdictional feature by the statutory dollar amount, rather than multiplying the *number of days* during which plowing "discharges" occurred in particular "waters" by the statutory dollar amount. Pet. App., 12-16.

33 U.S.C. Section 1319(d), Pet. App. 209, authorizes civil penalties "not to exceed $25,000 *per day for each violation*" against persons violating Section 1311(a) by discharging pollutants without a permit. This statute contem-

plates maximum penalties will be calculated not in terms of the total number of individual violations of the same type, but, rather, in terms of *daily violation units*. The "top-down" method of penalty assessment (employed here) involves calculating the maximum statutory penalty by first finding how many distinct *categories* of CWA violations occurred, and then finding the number of days during which each category occurred and multiplying the number of days by $25,000. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 314 (4th Cir. 1986), vacated and remanded on other grounds, 484 U.S. 49 (§ 1319(d) speaks "in terms of penalties *per day* of violation, rather than *per violation*."); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990) ("each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000"); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1395 (D. Haw. 1993) (discussing top-down method of calculating number of categories and "*daily violations*" to arrive at maximum penalty).

The *Gwaltney* court rejected defendant's interpretation there as untenable because it impermissibly calculated the statutory maximum penalty "*per violation*," rather than "*per day* of violation." *Gwaltney*, 791 F.2d at 314. The Ninth Circuit and district courts here, too, read the words "per day" entirely out of the statute and impermissibly divided daily "soil discharges" within a single category of violation into hundreds of separate violations. Pet. App. 12-16. Under *Gwaltney*, Tsakopoulos' *maximum* penalty should have been limited to, at most, the *number of days* during which the same type of "point source discharges" of soil actually occurred in waters. Counting as separate violation units the number of times a single point source (i.e., a plow shank) crossed a single jurisdictional feature during a single day impermissibly converts a single *daily* violation unit of the same activity into numerous sub-daily violation units and illegally establishes the maximum penalty "per violation,

rather than per day of violation" – a result "inconsistent with the language of § 1319(d)." *Gwaltney*, 791 F.2d at 314.[26]

Where the "violation unit" is measured by less than a single day's period of time – for example, an "hourly maximum violation" occurring multiple times during the same day – the CWA limits the maximum penalty to one day for all such violations *if they are of the same type*. *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1046, n. 1 (W. D. Mo. 1984), cited with approval by *Tyson Foods*, 897 F.2d at 1138, 1138-1139 (holding Congress amended § 1319(d)'s language to its current "per day for each violation" to clarify the statute in accordance with *Amoco*'s interpretation).

Tsakopoulos' alleged violations all fell within the *single distinct category* of alleged discharge of a single "pollutant" – "fill" from native soil turned in place – from a "point source" without a permit. Pet. App. 15. In performing its "top down" analysis, the court should therefore have added the number of *daily* violations of this category and multiplied that total by $25,000. *Hawaii's Thousand Friends*, 821 F.Supp. at 1395. The Ninth Circuit admitted the fact that all violations were of the same type made its penalty holding problematic, Pet. App. 14-15, because the cases it relied on imposed multiple penalties for "separate" violations on the same day only where the violations are in *different and distinct categories*. Pet. App. 28. Nevertheless, despite extensive evidence introduced by the Government in the form of daily time records of the deep plow operators, the lower courts

[26] The government incorrectly contends *Gwaltney* is irrelevant because it discusses a prior version of CWA § 309(d). Opp. Br. 20. In fact, *Atlantic States Legal Foundation, Inc. v. Tyson Foods*, 897 F.2d 1128 (11th Cir. 1990), held Congress' 1987 Amendment to CWA § 309(d) (33 U.S.C. § 1319(d)), to which respondents refer, was "intended to *clarify* that each *distinct* violation is subject to a separate *daily* penalty assessment of up to $25,000". *Id.* at 1139, add'l emph. added, quoting H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. 132.

failed to engage in *any* analysis of the number of days on which such plowing occurred and never even *estimated* the number of daily violation units. CR189, ER1042-1043.

The Ninth Circuit majority admitted its approach was not "free from difficulty," but read the "per day" language out of the statute anyway because of supposed "incentive problems." Pet. App. 15. The rule of lenity compels a narrower, more limited construction in accordance with past precedents, however, since "[c]ivil penalties may be considered 'quasi-criminal' in nature," *First American Bank of Virginia v. Dole*, 763 F.2d 644, 651, fn. 6 (4th Cir. 1985), and substantially similar language -- "per day of violation" -- governs *criminal* penalties for negligent and intentional violations under 33 U.S.C. § 1319(c)(1), (2), as well.[27] *Crandon v. United States*, 494 U.S. 152, 158 (1990) (rule of lenity is "time-honored interpretive guideline" applied to resolve any ambiguity in ambit of criminal statute's coverage); *United States v. Thompson/Center Arms Company*, 504 U.S. 505, 525 (1992) ("The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes") (dis. opn. of Stevens, J.) The Ninth Circuit's approach to interpretation not only violates the rule of lenity, but it is arbitrary, since there is no logical stopping

[27] It would seem anomalous to hold those prosecuted *criminally* for numerous repeated violations of a single category on a single day are subject to a *lesser* fine than those prosecuted *civilly* for the same number of violations, on the basis that the civil statute allows "stacking" while the criminal provision does not. The *Tyson* court held the language "per day of such violation" meant the same thing as the slightly differently worded "per day for each violation," *Tyson Foods*, 897 F.2d at 1139, and the former phrase is essentially equivalent to the criminal penalty "per day of violation" language. Moreover, lenity is compelled by due process given the complete failure of the CWA and agency regulations, or even any authoritative interpretation thereof, to provide fair or adequate (or any) notice to petitioners that their plowing conduct was regulated under CWA Section 404 in the first place. E.g., *Gates & Fox Co., Inc. v. OSHRC*, 790 F.2d 154, 155-157 (D.C. Cir. 1986) (Scalia, J.).

point for calculating daily penalty assessments. If each plow has multiple shanks, why not assess a separate daily penalty for each individual furrow created on each pass? And if each furrow pass is a separate daily violation, why not each yard, each foot, or each inch thereof? Nor is this arbitrary interpretation of § 1319(d) fairly supported by otherwise "irrational results" or the "policy goal of discouraging pollution." Pet. App. 15.

The Ninth Circuit's rationales for imposing multiple maximum daily penalties for repeated violation of the same category on the same day necessarily presuppose a *knowing* and *intentional* violator, and fail to account for the fact that such violators are already subject to *substantial additional criminal penalties* under the CWA, including first-time fines up to $50,000 per day and three years imprisonment, *see* § 1319(c)(2) – clearly significant deterrents to *intentional* misconduct.[28] Since the criminal penalty provisions already prescribed by Congress in § 1319(c) fully allay any supposed "incentive" concerns, such concerns cannot support the Ninth Circuit's erroneous and arbitrary interpretation of § 1319(d)'s *civil* penalty provision.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

[28] Tsakopoulos' violations were neither alleged by the government nor found by the district court to be intentional. Pet. App. 143-144.

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